

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KEVIN LYNESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NO. CR-05-6029-EFS

NO. CV-07-5059-EFS

**ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE**

Before the Court, without oral argument, is *pro se* Petitioner Kevin Lyness' Motion to Vacate, Set Aside, or Correct Sentence. (Ct. Rec. 94.) After reviewing the submitted material, the Court is fully informed and denies Petitioner's motion. The reasons for the Court's Order are set forth below.

I. Background

On June 15, 2006, Petitioner pleaded guilty to Distribution of a Controlled Substance, Cocaine, in violation of 21 U.S.C. § 841. (Ct. Rec. 80.) After moving through the plea colloquy, the Court accepted Petitioner's guilty plea as knowing, intelligent, voluntary and not induced by fear, coercion or ignorance. (Ct. Rec. 78.)

1 Petitioner's Plea Agreement, Paragraph 1, titled "Guilty Plea and
2 Maximum Statutory Penalties," put him on notice that he faced a maximum
3 statutory penalty of forty (40) years imprisonment. (Ct. Rec. 80 at 1.)
4 Paragraph 9(b), titled "Acceptance of Responsibility," put Petitioner on
5 notice that the Government believed he would be subject to a career
6 offender guideline sentence. *Id.* at 6. Paragraph 10, titled
7 "Departures," permitted Petitioner to request a downward departure or
8 non-guideline sentence of no less than ten (10) years if the Court found
9 Petitioner was a career offender. *Id.* at 7. Paragraph 11, titled
10 "Incarceration," set forth what sentences the parties could recommend
11 depending on whether or not the Court found Petitioner was a career
12 offender under United States Sentencing Guideline § 4B1.1. *Id.*
13 Paragraph 11 specifically stated that the Government was permitted to
14 argue that Petitioner was a career offender. *Id.* at 8.

15 At sentencing, the Government agreed with the Presentence
16 Investigation Report and asserted that Petitioner qualified for a career
17 offender sentence under § 4B1.1. (Ct. Rec. 88 at 2.) As expected,
18 Petitioner responded that he did not qualify for a career offender
19 sentence under § 4B1.1. (Ct. Rec. 86 at 2.) Even though the Court
20 determined that Petitioner qualified as a career offender under § 4B1.1,
21 it nevertheless sentenced him to 96 months imprisonment. (Ct. Rec. 90.)
22 This sentence was three (3) years above the five (5) year mandatory
23 minimum, but seven (7) years below the bottom of Petitioner's career
24 offender guideline range and two (2) years below the ten (10) year
25 imprisonment term Petitioner agreed to recommend in the Plea Agreement.
26 (Ct. Rec. 80 at 7.)

II. Discussion

1. Legal Standard - 28 U.S.C. § 2255

Under section 2255, a court must vacate and set aside a judgment and discharge the prisoner, or resentence the prisoner, or grant a new trial, or correct the sentence, if the court finds any one of the following: (1) the judgment was rendered without jurisdiction; (2) the sentence imposed was not authorized by law or otherwise open to collateral attack; or (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. 28 U.S.C. § 2255.

A district court must grant a hearing to determine the validity of a petition brought under section 2255 "unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting 28 U.S.C. § 2255). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996) (internal quotations omitted). To earn the right to a hearing, therefore, the movant must make specific factual allegations which, if true, would entitle him to relief. *Id.* Mere conclusory statements in a section 2255 motion are insufficient to require a hearing. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980). The choice of method for handling a section 2255 motion is left to the discretion of the district court. *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (citations omitted).

2. Illegal Sentence

Petitioner argues that his 96-month § 4B1.1 career offender sentence is illegal because the sentence was not authorized by law. (Ct. Rec. 95 at 3.) The Government impliedly responds that Petitioner's sentence was proper. (Ct. Rec. 98 at 3.)

An illegal sentence is one "not authorized by judgment of conviction" or "in excess of the permissible statutory penalty for the crime." *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986), *cert. denied* 479 U.S. 1094 (1987).

Here, Petitioner's sentence was not illegal because his sentence was authorized by the judgment of conviction and his 96-month sentence was well within the 40-year maximum statutory penalty for Distribution of a Controlled Substance, Cocaine, in violation of 21 U.S.C. § 841. Accordingly, the motions and records conclusively show that Petitioner is not entitled to relief. *See Braylock*, 20 F.3d at 1465.

3. Due Process Violation

Petitioner next argues that his due process rights were violated because he and the Government never reached an agreement on whether he was a career offender. (Ct. Rec. 95 at 1.) The Government responds that there is no due process violation because the Plea Agreement explicitly acknowledged that a § 4B1.1 career offender sentence enhancement was possible. (Ct. Rec. 98 at 3.)

Due process requires that a guilty plea be a knowing and voluntary act; the defendant must be advised of and understand the consequences of the plea. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1996) (citations omitted). "The consequences of a guilty plea, with respect to sentencing, mean only that the defendant must know the maximum term

1 and fine for the offense charged. As long as [the defendant] understood
2 the length of the time he might possibly receive, he was fully aware of
3 his plea's consequences." *United States v. Rivera*, 898 F.2d 442, 447
4 (5th Cir. 1990) (citations omitted).

5 Due process also requires adequate notice of the possibility of a
6 sentence enhancement based on recidivism. *United States v. Pearson*, 910
7 F.2d 221, 223 (5th Cir. 1990). Notice is necessary because it provides
8 the defendant an opportunity to challenge the propriety of the
9 enhancement. *Id.*

10 Here, Petitioner's 96-month § 4B1.1 career offender sentence did not
11 violate his due process rights. To be sure, Petitioner is correct that
12 he and the Government did not reach an agreement on whether he was a
13 career offender. A lack of agreement, however, does not make a § 4B1.1
14 career offender sentence improper because Petitioner was on notice of the
15 potential enhancement and the Plea Agreement stated that the Court would
16 ultimately determine if Petitioner qualified as a career offender.

17 As indicated in the Background, Paragraphs 9(b), 10, and 11 of the
18 Plea Agreement all discuss the potential for a career offender sentence.
19 In fact, Paragraph 11 sets forth two separate sentencing recommendations
20 depending on whether the Court determined Petitioner was a career
21 offender. (Ct. Rec. 80 at 7.) Moreover, both parties submitted
22 sentencing memoranda arguing whether or not Petitioner qualified for a
23 § 4B1.1 career offender sentence. (Ct. Recs. 86 & 88.) Accordingly, it
24 cannot be said that Petitioner's due process rights were violated
25 because: (1) he was on notice of his potential eligibility for a § 4B1.1
26 career offender sentence; (2) his 96-month sentence was within the
40-year statutory maximum; and (3) his 96-month sentence was seven (7)

1 years below the bottom of Petitioner's career offender guideline range
2 and two (2) years below the ten (10) year imprisonment term Petitioner
3 agreed to recommend in the Plea Agreement. The motions and records
4 conclusively show that Petitioner is not entitled to relief. See
5 *Braylock*, 20 F.3d at 1465.

6 **4. Breach of Plea Agreement**

7 Petitioner asserts that, because the § 4B1.1 career offender
8 sentence violated his due process rights, the literal terms of the plea
9 agreement should be enforced. (Ct. Rec. 95 at 1.) This argument is
10 unpersuasive because, as discussed above, the career offender sentence
11 did not violate Petitioner's due process rights. Moreover, it is unclear
12 how the literal terms of the Plea Agreement were not enforced.

13 Paragraph 11 indicated that both parties were free to argue for or
14 against a career offender sentence - the parties did so. (Ct. Rec. 80
15 at 8.) The parties also agreed that the Court ultimately determines what
16 sentence is appropriate and what enhancements apply - the Court did so
17 and concluded Petitioner was subject to a § 4B1.1 career offender
18 sentence. (Ct. Rec. 80 at 2-3.) Because the Plea Agreement's terms were
19 literally enforced, Petitioner is not entitled to relief.

20 **5. Ineffective Assistance of Counsel**

21 Petitioner asserts that his counsel failed to object to the
22 Government's alleged plea agreement breach and that this failure amounted
23 to ineffective assistance of counsel. (Ct Rec. 95 at 4.)

24 Claims of ineffective assistance of counsel are governed by
25 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to
26 prove that counsel acted ineffectively, a petitioner must meet a
two-prong test. First, the petitioner must show that his counsel's

1 performance fell below an objective standard of reasonableness. *Id.* at
2 687. A court's review of counsel's performance should be "highly
3 deferential" because there is a "strong presumption" that counsel
4 rendered adequate assistance and exercised reasonable professional
5 judgment. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th
6 Cir. 1986). Second, a petitioner must also show that his counsel's
7 deficient performance prejudiced his defense. *Strickland*, 466 U.S. at
8 687. "The [petitioner] must show that there is a reasonable probability
9 that, but for counsel's unprofessional errors, the result of the
10 proceeding would have been different. A reasonable probability is a
11 probability sufficient to undermine confidence in the outcome." *Id.* at
12 693-94. The court need not address both the performance prong and the
13 prejudice prong if the petitioner fails to make a sufficient showing of
14 either. *Id.* at 700.

15 Here, Petitioner cannot demonstrate that his counsel's performance
16 fell below an objective standard of reasonableness. This is because the
17 failure to raise a meritless legal argument does not constitute
18 ineffective assistance of counsel. *Shah*, 878 F.2d at 1162. And since
19 the Plea Agreement permitted both parties to argue for or against a
20 § 4B1.1 career offender sentence, it would have been fruitless for
21 Petitioner's counsel to argue that the Government's recommendation
22 somehow breached the Plea Agreement at sentencing.

23 **III. Conclusion**

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Petitioner's Motion to Vacate, Set Aside or Correct Sentence
26 **(Ct. Rec. 94)** is **DENIED**;

2. The Government's Motion for Order to Dismiss (**Ct. Rec. 99**) is **DENIED** as moot;

3. The criminal file and its civil companion case shall be closed.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to Respondent's counsel and Petitioner.

DATED this 25th day of February, 2008.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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